

NO. 42072-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

HARVEY COUSINS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 10-1-00950-5

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Michelle Bacon-Adams
904 Dwight St.
Port Orchard, WA 98366

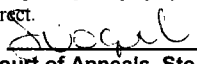
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED May 18, 2012, Port Orchard, WA 
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
I. COUNTERSTATEMENT OF THE ISSUES	1
II. STATEMENT OF THE CASE	1
A. PROCEDURAL HISTORY	1
B. FACTS	1
III. ARGUMENT.....	6
AS THE DEFENSE CONCEDED BELOW, DEPUTY STACY PROPERLY REQUESTED THE COUSINS BROTHERS TO STEP OUT OF THEIR TRUCK FOR OFFICER SAFETY REASONS DURING A TRAFFIC STOP WHERE THE DEPUTY WAS ALONE AT THE TIME OF THE REQUEST, IT WAS AFTER MIDNIGHT, AND HE OBSERVED TWO RIFLES AND AMMUNITION IN THE FRONT SEAT OF THE TRUCK, AND MOREOVER, BASED ON HIS PRIOR LAW ENFORCEMENT CONTACTS WITH THE BROTHERS, STACY PROPERLY REQUESTED HARVEY’S ID TO CONFIRM HIS IDENTITY AND TO MAKE SURE IT WAS APPROPRIATE TO RELEASE HIM WITH THE GUNS.....	6
IV. CONCLUSION.....	11

TABLE OF AUTHORITIES

CASES

<i>State v. Glover</i> , 116 Wn.2d 509, 806 P.2d 760 (1991)	9
<i>State v. Mendez</i> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	7
<i>State v. Rankin</i> , 151 Wn.2d 689, 92 P.3d 202 (2004).....	6, 8
<i>State v. Samsel</i> , 39 Wn. App. 564, 570-571, 694 P.2d 670 (1985).....	9
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984)	9
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968)	8, 9

CONSTITUTIONAL PROVISIONS

Const. Article I, Section 7	6
-----------------------------------	---

I. COUNTERSTATEMENT OF THE ISSUES

Whether, as the defense conceded below, Deputy Stacy properly requested the Cousins brothers to step out of their truck for officer safety reasons during a traffic stop where the deputy was alone at the time of the request, it was after midnight, and he observed two rifles and ammunition in the front seat of the truck, and whether, moreover, based on his prior law enforcement contacts with the brothers, Stacy properly requested Harvey's ID to confirm his identity and to make sure it was appropriate to release him with the guns?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Harvey Cousins was charged by information filed in Kitsap County Superior Court with possession of methamphetamine. CP 1. After his motion to suppress was denied, he went to trial on stipulated facts, and was convicted. CP 20-27.

B. FACTS

The facts relevant to this appeal were adduced at the CrR 3.6 hearing.

Kitsap County Sheriff's Deputy John Stacy worked patrol. RP (4/5) 6. Stacy stopped a pickup truck after midnight because the headlight was out.

RP (4/5) 7, 39. He contacted the driver, Joshua Cousins,¹ and informed him of the reason for the stop. RP (4/5) 7-8.

Stacy identified the passenger, Joshua's brother Harvey, either when he got Joshua's ID or when Joshua told him his name. RP (4/5) 8. At that point, Stacy realized he knew them both from prior criminal law enforcement contacts, but "mostly Harvey." 8. Stacy could not recall the specific circumstances of the prior contacts. RP (4/5) 8. Stacy also knew their mother, who was a county corrections officer. RP (4/5) 18. They could have loaded the rifles very quickly. RP (4/5) 21. He recognized Harvey before he asked for his ID; it was while they were still in the truck. RP (4/5) 21.

After informing Joshua of the reason for the stop, Stacy looked over and saw two rifles sitting in between the Joshua and Harvey. RP (4/5) 8. There was a box of ammunition in the seat next to the guns. RP (4/5) 9. At that point, Stacy asked them to both get out and step to the rear of the truck. RP (4/5) 9.

Stacy was by himself. RP (4/5) 9. It was after midnight, and it was dark. RP (4/5) 9. There were two people in the truck with rifles, and he did not feel safe standing there talking to them with the rifles and ammunition so close. RP (4/5) 9. He asked them to step out for his own safety. RP (4/5) 9.

¹ The Cousins brothers will be referred to by their first names for the sake of clarity. No

Stacy also explained that he found the guns suspicious:

Q. Why is it suspicious to you, Deputy Stacy?

A. Well, like she asked me, I'm a hunter and I can't imagine driving around that time of night in Port Orchard, or any other city, with two rifles with ammunition on the seat. There's nothing to hunt at that time of night.³ So, I mean, I am a hunter. I hunt all the time. I can't imagine a situation where I would be doing that.

RP (4/5) 26.

After they stepped out, Port Orchard Officer Deatherage arrived. RP

(4/5) 9. Stacy asked Deatherage to ID Harvey, just be sure of his identity.

RP (4/5) 10. Stacy had already determined that he was Harvey Cousins, however. RP (4/5) 10.

Stacy ran Harvey's name through dispatch. RP (4/5) 10. He would have run Joshua's name at the time he obtained his ID and registration. RP (4/5) 16. He ran Harvey's ID because he could not recall what the prior contact was about and was not sure if he was convicted felon. RP (4/5) 22. Because it was late at night and they had guns in the truck, he was not going to release them back into the truck with him still in the area before making sure they were not convicted felons, and before making sure that there was no other reasons they should not have the guns. RP (4/5) 10. Stacy did not want to "end up getting shot." RP (4/5) 10.

disrespect is intended.

Dispatch informed Stacy that there was an outstanding warrant for Harvey for DWLS, so Stacy arrested him. RP (4/5) 11. He patted Harvey down incident to arrest and found a glass methamphetamine pipe in his jacket pocket. RP (4/5) 11. Harvey said that the jacket was his cousin's. RP (4/5) 11. Harvey declined to name him. RP (4/5) 12. Harvey said that he had spent the day with Joshua. RP (4/5) 12. Joshua told Stacy that Harvey had been wearing the jacket the whole day. RP (4/5) 12. Harvey then said that jacket belonged to someone name Jack. RP (4/5) 12.

Stacy asked Joshua, who owned the truck, if he could search it. RP (4/5) 13. Joshua assented. RP (4/5) 13. On the passenger floorboard, Stacy found a backpack. RP (4/5) 13. Joshua said that it belonged to Harvey. RP (4/5) 13.

Stacy told Harvey what Joshua said, and Harvey responded that it was not his, but he could go ahead and search it anyway. RP (4/5) 14. Inside the backpack were some pornographic magazines, a plastic bag with two marijuana plants and a metal lockbox. RP (4/5) 14. Harvey also agreed to let Stacy have the key to open the lockbox and to search it. RP (4/5) 23. In the box was a GPS, another pipe, a small bag of processed marijuana and a baggie with methamphetamine powder. RP (4/5) 14.

Joshua was not arrested. RP (4/5) 15.

On cross-examination, Stacy reiterated why he ran Harvey's ID:

- Q. And it's your testimony one more time that you wanted my client, Harvey Cousins ID because you wanted to know if he was a convicted felony; is that correct?
- A. Not just that, but I wanted to see if there was any warrants that would warrant me to release him back to the truck with ammunition and rifles.

Again, I can't stress the importance of, you know, being -- letting two people go back into a truck after midnight with a vehicle with two rifles and ammunition sitting on the passenger seat. I did not feel safe allowing them to go back there until I knew who they were and if they were convicted felons.

Also, when we run their names, it will come back if there's any officer safety warnings. We have a lot of people in Kitsap County that has officer safety warnings about them, which means they are violent offenders that can hurt police officers.

RP (4/5) 24-25.

Joshua testified, *inter alia*, that he consented to the search of the truck. RP (4/5) 35. Joshua acknowledged that the guns and the ammunition were easily accessible by either brother. RP (4/5) 37. Joshua believed Stacy was validly concerned about his safety. RP (4/5) 37.

III. ARGUMENT

AS THE DEFENSE CONCEDED BELOW, DEPUTY STACY PROPERLY REQUESTED THE COUSINS BROTHERS TO STEP OUT OF THEIR TRUCK FOR OFFICER SAFETY REASONS DURING A TRAFFIC STOP WHERE THE DEPUTY WAS ALONE AT THE TIME OF THE REQUEST, IT WAS AFTER MIDNIGHT, AND HE OBSERVED TWO RIFLES AND AMMUNITION IN THE FRONT SEAT OF THE TRUCK, AND MOREOVER, BASED ON HIS PRIOR LAW ENFORCEMENT CONTACTS WITH THE BROTHERS, STACY PROPERLY REQUESTED HARVEY'S ID TO CONFIRM HIS IDENTITY AND TO MAKE SURE IT WAS APPROPRIATE TO RELEASE HIM WITH THE GUNS.

Harvey argues that the trial court erred in denying his motion to suppress. This claim is without merit because the trial court properly concluded that the deputy's request for the Cousins brothers to exit their truck was for legitimate officer safety reasons.

Where the facts are undisputed, the determination of whether there is a violation of Article I, Section 7 of the Washington Constitution is a question of law reviewed de novo. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). Harvey has not assigned error to any of the trial court's factual findings.

Article I, Section 7 prohibits law enforcement from restricting the movements of passengers in lawfully stopped vehicles absent objective rationale predicated upon safety considerations. *State v. Mendez*, 137 Wn.2d

208, 970 P.2d 722 (1999), *overruled on other grounds*, *Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). In *Mendez*, the court held that telling a driver or a passenger to get out of a car for purposes of officer safety is permitted “in order to preserve officer safety even in the absence of circumstances that would justify an investigatory *Terry* stop.” *Mendez*, 137 Wn.2d at 215-16. The Court further held that the officer safety concerns must be based on objective rationale:

A police officer should be able to control the scene and ensure his or her own safety, but this must be done with due regard to the privacy interests of the passenger, who was not stopped on the basis of probable cause by the police. An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy art. I, § 7.

Mendez, 137 Wn.2d at 220.

The *Mendez* Court articulated the following factors warranting an officer’s control of a passenger at a traffic stop:

The number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants.

Mendez, 137 Wn.2d at 220-21.

Here, Harvey conceded at trial that Stacy was authorized to request the brothers to step out of the vehicle. RP (4/5) 42. The concession is supported by the evidence. Stacy was alone after midnight in a remote area,

there were two passengers, there were two rifles, with readily accessible ammunition, and Stacy was aware of the brothers from prior law enforcement contacts. Joshua himself recognized that Stacy had valid officer safety concerns at the time. RP (4/5) 37.

Below, Harvey nevertheless argued that the evidence should be suppressed because it was the fruit of Stacy's improper request of Harvey's ID. The Washington State Supreme Court has held that a passenger in a vehicle is unconstitutionally detained when a law enforcement officer, without an independent reason, requests identification from a passenger. *Rankin*, 151 Wn.2d at 700. Law enforcement officers may "engage passengers in conversation"; however, an officer may not turn the contact into an investigation without an independent reason. *Rankin*, 151 Wn.2d at 700.

In *Rankin*, the defendants in the consolidated appeal were both passengers in cars that were lawfully stopped for traffic infractions. *Rankin*, 151 Wn.2d at 692-93. In both cases, the production of an ID led to the passenger's arrest. *Id.* In neither case did the officer have any articulable suspicion of criminal activity. *Rankin*, 151 Wn.2d at 699.

An investigative Terry stop is one exception to the rule that searches and seizures must be supported by a warrant after a showing of probable

cause. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968). An officer may detain an individual for investigation when the officer has a reasonable and articulable suspicion that the person is engaged in criminal activity. *Terry*, 392 U.S. at 21. In *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984), the Supreme Court outlined the governing inquiry:

First, was the initial interference with the suspect's freedom of movement justified at its inception? Second, was it reasonably related in scope to the circumstances which justified the interference in the first place?

To justify an intrusion, the police officer must be able to point to “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21. The Court examines the reasonableness of an officer's suspicion under the totality of the circumstances known to the officer at the time when the stop was made. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). While an inchoate hunch is insufficient to justify a stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience. *State v. Samsel*, 39 Wn. App. 564, 570-571, 694 P.2d 670 (1985). The officer is not required to ignore that experience. *Id.* Further, reasonableness is measured not by exactitudes, but by probabilities. *Id.*

Here, Stacy did have articulable suspicions. He knew that Harvey had had prior contact with law enforcement, but could not recall whether he had a

felony conviction. Stacy was faced with the possibility of releasing two individuals into the night with rifles and ammunition. The brief detention of Harvey to make sure that he was permitted to possess a firearm and to make sure that he did not otherwise pose a threat to the community or to Stacy was thus justified. Further, the detention itself lasted no longer than necessary for Stacy to determine that Harvey had a warrant, presumably a few moments. The detention was reasonable and proper.

Upon learning that Harvey had an outstanding warrant, Stacy properly searched his person incident to arrest. Further the searches of the truck and bag and lockbox were pursuant to valid consent, which Joshua confirmed at the hearing. Beyond arguing that the request for ID amounted to an unlawful seizure, Harvey did not at trial or in this Court challenge the propriety of these subsequent searches. The trial court's ruling should be affirmed.

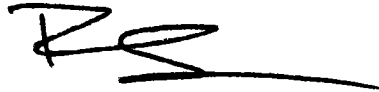
IV. CONCLUSION

For the foregoing reasons, Harvey Cousins's conviction and sentence should be affirmed.

DATED May 18, 2012.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS' followed by a long horizontal stroke.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

MACINTOSH HD USERS RANDYSUTT DOCUMENTS WORK.CASES COUSINS, HARVEY 09DA 11-09 APP DOC COUSINS COA BRIEF DOC

KITSAP COUNTY PROSECUTOR

May 18, 2012 - 3:26 PM

Transmittal Letter

Document Uploaded: 420724-Respondent's Brief.pdf

Case Name: STATE V HARVEY COUSINS

Court of Appeals Case Number: 42072-4

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Lori A Vogel - Email: **lvogel@co.kitsap.wa.us**